Supreme Court, U.S.
FILED
DEC 5 1984
ALEXANDER L. STEVAS
CLERK

(2)

NO. 84-775

In The
Supreme Court of the United States
October Term, 1984

ROBERT BUTTERWORTH, SHERIFF, et al.,
Petitioner,

vs.

RAY SANDSTROM,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

Although Respondent submits that this case is not a proper case for certiorari, and would re-phrase the questions presented for review as follows:

(1) Should certiorari be granted upon a claim of failure to exhaust state remedy prior to a Title 18 USC §2254 action where the appeals court correctly and logically applied the rulings in *Anderson v. Harless,* 459 U.S. 4 (1982) and *Rose v. Lundy,* 455 U.S. 509 (1982)?

(2) Should certiorari be granted to review and reverse a decision of the court of appeals which holds that a contempt adjudicated against an attorney in an ongoing trial is subject to review and reversal if the judge who adjudicated the contempt was in fact severely prejudiced against the attorney where the decision adhered to the considerations expressed in *Offutt v. United States,* 348 U.S. 11 (1954)?

LIST OF PARTIES TO THE PROCEEDING

The parties to this proceeding in the United States Court of Appeals for the Eleventh Circuit were as follows:

Robert Butterworth, Sheriff
and
State of Florida ..... Appellants

Ray Sandstrom ..... Appellee

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STATUTE:

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OPINIONS BELOW

The Petitioner correctly cites this case as it appeared in the District Court of Appeals of Florida, Fourth District [*Sandstrom v. State,* 402 So.2d 461 (Fla 4th DCA 1981)] and correctly cites the denial of discretionate re-

view of that decision by the Supreme Court of Florida [*Sandstrom v. State,* 412 So.2d 470 (Fla 1982)]. However, the Petitioner *incorrectly* cites the decision of the United States Court of Appeals, Eleventh Circuit, which the Petitioner seeks to review through certiorari. The correct citation is *Sandstrom v. Butterworth,* 738 F.2d 1200 (11th Cir. 1984), the Petitioner erroneously cites the Federal Second Reporter volume as *438* rather than *738*. The opinion below failed to include the decision of the United States District Court, Southern District of Florida, which was the matter reviewed by appeal by the United States Court of Appeals for the Eleventh Circuit which is sought to be reviewed by certiorari. That opinion appears in Appendix hereto.

—o—

JURISDICTIONAL STATEMENT

The Respondent accepts the jurisdictional statement as proposed by Petitioner. However, Respondent submits this is not a proper case for the granting of certiorari.

—o—

FEDERAL CONSTITUTIONAL PROVISION INVOLVED

The Respondent accepts the matter as postulated by the Petitioner under this heading.

—o—

STATEMENT OF THE CASE

The Respondent cannot accept the statement of the case as posed by the Petitioner for the reasons set forth hereinbelow.

The Petitioner asserts the Respondent, as Appellant, appealed to the state appellate court[1] "* * * on the basis that the facts and procedures used by the trial court did not support a valid judgment of direct criminal contempt under state law."[2] However, the District Court of Appeals involved said the Respondent, as the Appellant therein, posed differently, that is:

> "On appeal, it is asserted that *the trial judge should have disqualified himself and* that the conduct of appellant was such that a finding of contempt constituted an abuse of discretion. We reject *both* arguments." (Emphasis added).[3]

Contrary to the recitation of the Petitioner that:

> "The appellate court made the finding that the review of the facts indicated the trial judge was not required to disqualify himself."[4]

The state appellate court said:

> "Here, the trial judge chose to act immediately rather than waiting till the conclusion of the trial. This was proper and required because counsel would not proceed in accordance with the court's directions. In accordance with the *Mayberry* decision, instant and immediate punishment for contempt militates against

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1. District Court of Appeals, Fourth District.
2. Petition for Writ of Certiorari, p.4.
3. 402 So.2d 461 at 463.
4. Petition for Writ of Certiorari, p.4.

disqualification. Our review of the transcript convinces us that the judge was not required to disqualify himself."[5]

The state appeals court refused to reach the issue of the prejudice of the judge and whether it was of such proportion as to compel his recusal. That court merely construed the federal authorities it relied upon[6] as holding a judge (regardless of his prejudice) is not required to recuse himself so long as he adjudicates a purported contempt against an attorney during the course of trial; that only if that judge waits until the conclusion of trial is he compelled to disqualify himself for his prejudice.

The United States District Court, Southern District of Florida, having considered the record of the proceedings, the opinion of the appeals court and further having conducted an evidentiary hearing, ruled in the favor of the Respondent herein as the Petitioner in a Title 28 USC §2254 habeas corpus proceeding and discharged this Respondent subject to the State of Florida providing Respondent a new hearing upon the issue of contempt before another judge other than the one who adjudged Respondent guilty of contempt since the judge was disqualified by reason of prejudice through personal embroilment with the Respondent.[7] The Petitioner urged a failure to exhaust state remedies in the district court as well as before

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5. 402 So.2d 461 at 464.

6. Principally the cases of *Mayberry v. Pennsylvania*, 400 U.S. 455, 91 S.Ct. 499, 27 L.Ed.2d 532 (1971); and (as cited therein) *Ungar v. Sarafite*, 376 U.S. 575, 84 S.Ct. 841, 11 L.Ed.2d 921 (1964).

7. The opinion of the United States District Court appears in the Appendix hereto, pages A.1-12.

the circuit court below. Each of those courts ruled adversely to the Petitioner on that issue.

The United States Court of Appeals, Eleventh Circuit found and ruled[8] (as the district court) that the judge who adjudicated the Respondent herein to be in contempt to be "severely prejudiced"[9] against the Respondent and so personally embroiled that such prejudice precluded his adjudicating the issue of contempt against the Respondent. That notwithstanding the adjudication occurred during trial the "right to an unbiased tribunal outweighs countervailing values"[10] a fair trial and due process are mandated. Additionally, as noted by the United States Court of Appeals, it found the state court of appeals

> "* * * not only had the 'opportunity to pass' upon petitioner's claimed constitutional violation, see *Rose v. Lundy*, 455 U.S. 509, 518, 102 S.Ct. 1198, 1203, 71 L.Ed.2d 379 (1982), it actually did so. Exhaustion of the constitutional issue raised in this appeal, therefore, is undeniable."[11]

REASONS FOR NOT GRANTING THE WRIT

The Petitioner has asserted in each step of the federal proceedings of this case that the Respondent has failed to exhaust his state court remedies, requiring a dismissal

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8. *Sandstrom v. Butterworth*, 738 F.2d 1200 (11th Cir. 1984).
9. Id. at p.1214.
10. Id. at p.1214.
11. Id. at p.1206.

of the same. Each federal court thus far has found contrarily to such contention. Addressing this issue the court of appeals noted

> "The habeas petitioner 'must have "fairly presented" to the state courts the "substance" of his federal habeas corpus claim.'
>
> In this case, however, the core of the exhaustion issue lies not in how petitioner's state court pleadings are to be interpreted. Instead, we must look to what the state courts actually considered. The State District Court of Appeal heard petitioner to raise two issues—i.e., that petitioner's conduct could not support a finding of contempt and that the trial judge should have disqualified himself from ruling on the contempt citation. *Sandstrom v. State*, supra, 402 So. 2d at 463."[12]

The court immediately below footnoted[13]

> "Under Florida law, all claims that a judge adjudicating contempt should disqualify himself or herself are now decided upon federal constitutional standards. Reviewing a trial court contempt citation in *Scott v. Anderson*, 405 So.2d 228, 233 (Fla. 1st DCA 1981) the District Court of Appeals noted:
>
> The familiar axion 'a man should not be judge of his own case' is of ancient origin, but it has apparently not yet found its way into Florida law to the extent necessary to provide distinct guidelines for deciding under what circumstances a judge must disqualify himself to adjudicate direct criminal contempt charges involving disrespect or criticism directed to that judge. *Since the question is ultimately one of federal constitutional import, we must turn to and be guided by the federal decisions.* (emphasis added)."

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12. Id., at p.1206.

13. Id., footnote 2 at p.1206.

The court noted the state court to have interpreted *Mayberry*[14] to indicate that the trial judge in this Respondent's instance was not required to disqualify himself.[15] This is not a finding of *fact* to which the federal court might need defer; it is at best a mixed question of law and fact which the federal courts are at liberty to determine.[16]

As noted by the court below:

> "Factual determination made by a state court are entitled to a presumption of correctness. *See* 28 U.S. C. § 2254(d), *Sumner v. Mata*, 455 U.S. 591, 592, 102 S.Ct. 1303, 71 L.Ed.2d 480 (1982). Our examination of the State Court of Appeals opinion, however, reveals no particular finding of fact contradicted by the federal district court. Specifically, the state court made no findings regarding any preexisting hostility on the part of the trial judge towards the petitioner or concerning the judge's attitude towards petitioner during the *Nolan* trial. Rather, after reciting the 'directly and personally embroilled' standard articulated in *Mayberry, supra*, 400 U.S. at 464-466, 91 S.Ct. at 504-505, the State Court concluded, '[o]ur review of the transcript convinces us that the judge was not required to disqualify himself herein.'"[17]

Thusly, it is patently established that the Respondent herein did not only present the state court with the federal constitutional question but also that in considering the ruling of that court, the United States District Court below properly recognized factual resolves in accord with

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14. Citation appears in footnote 5, *supra*.

15. *Sandstrom v. Butterworth*, 738 F.2d 1200, at p.1206.

16. *Sumner v. Mata*, 455 U.S. 591, 102 S.Ct. 1303, 71 L.Ed.2d 480 (1982).

17. *Sandstrom v. Butterworth*, supra, at p.1207.

the state. The appeals court below painstakingly made it clear through their decision that the actions of the lower federal court in the habeas proceeding which they had under consideration, were appropriate and accorded with the authorities.

The court below recognized the posture of the State of Florida, through its Petitioner herein, that is:

> "Under the State's approach, bias on the part of a trial judge could never require reversal of a contempt judgment if the contempt was adjudicated and sentence pronounced during an ongoing trial."[18]

Clearly, the true issue in the final analysis resolves itself into the matter quoted immediately hereinabove. The state appeals court determined that regardless of the presence and regardless of the degree of prejudice of a trial judge against an attorney appearing before him in an ongoing trial, that judge could adjudge the contempt and pronounce sentence if he did so *during* the ongoing trial. The federal appeals court like the federal trial court, on the contrary, determined that each case must be resolved upon its own facts and that where, as in the instant case the judge has and exhibits a "pre-existing and very strongly held dislike for the [alleged contemnor-attorney]"[19] and exhibits the same in the ongoing trial on numerous occasions prior to adjudicating the contempt,

> "The trial judge had such contempt for the [Respondent herein] that the judge was incapable of representing the impersonal authority of law necessary for fair adjudication."[20]

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18. Id., at p. 1208.

19. Id., at p.1213.

20. Id., at p.1214.

Therefore, the court below resolved:

> "Where a contemnor claims on appeal that he was deprived of the right to an impartial tribunal, the reviewing Court must examine the record for indications of serious bias—bias that would prevent the fair administration of justice. If after examining the record, the reviewing court forms a definite and firm conviction that the presiding judge harbored such bias toward the contemnor, the contempt conviction must be overturned."[21]

The federal appeals court predicated its decision upon numerous, landmark decisions of this court, such as: *Offutt v. United States,* 348 U.S. 16, 75 S.Ct. 11, 99 L.Ed. 11 (1954); *Mayberry v. Pennsylvania,* 400 U.S. 455, 91 S.Ct. 499, 27 L.Ed.2d 532 (1971); *Marshall v. Jerrico, Inc.,* 446 U.S. 238, 100 S.Ct. 1610, 64 L.Ed.2d 182 (1980); *Taylor v. Hayes,* 418 U.S. 488, 94 S.Ct. 2697, 41 L.Ed.2d 897 (1974); *Codispoti v. Pennsylvania,* 418 U.S. 506, 94 S.Ct. 2687, 41 L.Ed.2d 912 (1974); *Bloom v. Illinois,* 391 U.S. 194, 88 S. Ct. 1477, 20 L.Ed.2d 522 (1968); *Sacher v. United States,* 343 U.S. 1, 72 S.Ct. 451, 96 L.Ed. 717 (1952); and *Cooke v. United States,* 267 U.S. 517, 45 S.Ct. 390, 60 L.Ed. 767 (1925). And, upon numerous of its own prior decisions, such as: *Farmer v. Strickland,* 652 F.2d 427 (5th Cir. 1981); *Howell v. Jones,* 516 F.2d 53 (5th Cir. 1975), *cert. denied,* 424 U.S. 916, 96 S.Ct. 1116, 47 L.Ed.2d 321 (1976); *Theriault v. United States,* 481 F.2d 1193 (5th Cir. 1972), *cert. denied,* 414 U.S. 1114, 94 S.Ct. 847, 38 L.Ed.2d 742 *and sub nom. Theriault v. Mobile City Jail,* 414 U.S. 1115, 94 S.Ct. 847, 38 L.Ed.2d 742 (1973). All of which cases are reconciled by the court to accord with the holding here sought to be reviewed by Petitioner. To grant review in

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21. Id., at p.1214.

order to resolve this matter in accord with the contentions of the Petitioner would require this court to find that in no circumstances, regardless of how prejudiced a judge might be toward an attorney and no matter what he may do to manifest such prejudice, could a contempt judgment entered during the course of an ongoing trial be reversed for lack of due process and fair trial. Constitutional due process and fair trial prescriptions would be but hollow words without legal significance. The question is *not,* as posed by the Petitioner, whether "in every instance in which the judge has been the target of the contemptuous remarks, the judge must retreat."[22] But rather, as said by the court of appeals below whether:

> "The trial judge had such contempt for the [Respondent herein] that the judge was incapable of representing the impersonal authority of law necessary for fair adjudication. *Offutt v. United States,* supra. 348 U.S. 16, 75 S.Ct. at 14".

CONCLUSION

For the sound reasons and grounds appearing in the decision sought to be reviewed herein, certiorari ought be denied.

Respectfully submitted,

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22. Petition for Writ at page 17.

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

NO: 82-6153-CIV-WMH

RAY SANDSTROM,

Plaintiff,

vs.

ROBERT BUTTERWORTH, etc., et al.,

Defendants.

ORDER

THIS CAUSE came before the Court on the petition for writ of habeas corpus filed by petitioner, RAYMOND SANDSTROM, pursuant to 28 U.S.C. § 2254.

Petitioner, while defense counsel in a murder prosecution, was found in contempt of court by the state Circuit Judge trying the case in the Broward County Circuit Court.

A thirty day sentence was imposed and the conviction was later affirmed by Florida's District Court of Appeal in *Sandstrom v. State,* 402 So.2d 461 (4th D.C.A. 1981). Thereafter, certiorari was denied by the Supreme Court of Florida. *Sandstrom v. State,* 412 So.2d 470 (Fla. 1982).

A hearing has been held in this cause and testimony was taken from the petitioner, the petitioner's law partner, Fred Haddad, and the state prosecutor, Thomas Kern. That testimony, combined with the overall record in the case, (including pertinent portions of the original trial transcript) all compel this Court to conclude that the earlier proceedings were infected by acrimonious

clashes between the judge and the defense counsel. Personal invectives were exchanged, as each accused the other of unprofessional conduct. Petitioner claimed that he was being prevented from engaging in vigorous representation of his client (a man facing the death sentence), while the judge charged that the defense was purposely trying to gain a mistrial.

This Court does not propose to pass judgment on the participants, in order to conclude the issue presented by this petition. The record speaks for itself. Its reportage well demonstrates the roles of the several participants. It is unnecessary for this Court to gainsay the trial judge, beyond ruling on the narrow legal points asserted in the petition. Nor, should the Court pass judgment on petitioner, since a granting of this petition will require another judge, to decide, at another time, the issue presented by his conduct. The sole question before this Court, is whether petitioner's constitutional rights were violated in the process of the adjudication of the contempt charge.

I do think it appropriate to comment that petitioner's position as to the extent of his right to cross examine, under the circumstances in question, appears quite incorrect.

A critical, if not cardinal, component of due process is the right to be tried before an impartial tribunal. At times, judges have not been the image of "the impersonal authority of law" but have become so "personally embroiled" with a lawyer in the trial as to make the judge at least temporarily unfit to sit in judgment on the contempt charge. *Mayberry v. Pennsylvania,* 400 US 455;

27 L.Ed 2d 532, 91 S.Ct. 499 (1971). That proscription applies here. The record before this Court, as well as the largely undisputed testimony of the witnesses taken in hearing, clearly indicated that the state judge was emotionally entangled with the petitioner. While courts facing this type of issue usually have to infer the trial judges perspective and attitude by studying the import of the contemnor's words, in this case, each participant frankly articulated his opinion. Set forth below are small portions of the exchanges, garnered from the trial transcript. These indicate the emotional involvement that existed.

At the outset, a conflict arose over whether Mr. Haddad (Petitioner's partner) would be allowed to participate as co-counsel. Delays in beginning the trial had aggravated the Judge. When petitioner's partner (Mr. Haddad) appeared in Court, the Judge told him he was not co-counsel, that he was "sick" of him and ordered him out of the courtroom. (TR. p.2) When this was objected to, the Court referred to Mr. Haddad in very unflattering terms, stating he was going to put him in jail and that he was "sick" of him. (TR. p.3) Upon a motion to disqualify, the Judge changed his mind and permitted Mr. Haddad to remain but directed that he not participate. Further derogatory remarks were made about Mr. Haddad. (TR. p.4) In this setting, the trial began.

A new altercation arose over petitioner's examination of the witness, Dr. Jeffrey Mann. It ended with Mr. Sandstrome (sic) being cited for contempt, for the first time.

(Cross examination in progress)

Q. (By Mr. Sandstrom) On this one, does it not say—

A. That is unknown white male number two. This one I have an autopsy—

Q. This says unknown white male?

Mr. Kern: He doesn't let him answer the question.

THE COURT: Let him finish.

A. This one is identified—

Q. (By Mr. Sandstrom) I didn't ask you that. I am—

THE COURT: You asked him to identify. Now please give him a chance to answer.

MR. SANDSTROM: I am asking him about this portion.

THE COURT: You are so rude and nasty about it.

MR. SANDSTROM: Wait a minute now. I am objecting and making a motion. I want to excuse this jury.

THE COURT: You are not moving the jury out. Make your motion.

MR. SANDSTROM: I move for a mistrial on the grounds that the Court is particiating in this and employing the improper language in this courtroom reflecting on counsel for the defendant.

THE COURT: You are acting like an animal.

MR. SANDSTROM: No, I am not acting like any animal. I think the Court is doing that.

THE COURT: You are the rudest person I have ever seen.

MR. SANDSTROM: I can say the same for you.

THE COURT: It is because of you.

MR. SANDSTROM: Go ahead. If you think you are threatening me, I understand the grounds of propriety and how to walk within them. When you invite a comment, I shall comment.

THE COURT: I find you in contempt of Court. I will sentence you after the trial is over.

This contempt citation failed to resolve the difficulties because immediately thereafter there were continuing exchanges, apparently made before the jury. It serves no useful purpose to outline here the totality of the exchanges which took place between court and counsel. It is sufficient to note, again, that the hostility continued and intensified as demonstrated by the record. The final exchange which led to petitioner's incarceration is set out.

THE COURT: Do you have any testimony you want to bring before the Court or any evidence you want to present?: (sic)

MR. SANDSTROM: I haven't had adequate opportunity to present any one of the many articles and matters upon cross examination that reflect that the method of examination by the defendant and his counsel is proper, and not in this atmosphere can I run out and bring in an article. I am supported by all of the articles, and I want my opportunity to show that, but I want to show it in front of an impartial judge, one who has not reflected as this Court has reflected its personal animosity towards me.

THE COURT: Mr. Sandstrom, for ten years I have been practicing—I have been trying cases as a Criminal Court Judge, and for ten years you have had your nauseating effect upon this Court and every other court in this courthouse.

Your antics are designed to cause mistrials so that your clients don't go to trial. You have been doing that, and you did it the last time we went to trial a few months back, a couple months back, and you have done it again this time.

You are going to attack this Court until such time as the Court finally loses its patience and makes some

statement which you are then going to take to the Appellate Court and have the Appellate Court hopefully reverse on.

Well, I am telling you that I have had about enough of you, and enough of your tactics.

Now I am telling you that you will either do the way I tell you to do in your interrogation in regard to transcripts or you are going to jail this afternoon.

MR. SANDSTROM: I am not going to alter my defense to buckle to the Court in such a manner that this defendant does not have his proper cross examination that he is lawfully entitled to.

THE COURT: Okay, Mr. Sandstrom, this is the last time.

Are you going to do the interrogation in a manner I tell you to do and then take it before the Appellate Court if you don't like the way I tell you to do it and the results are against your client, or are you going to refuse to do it the way I tell you to do?

MR. SANDSTROM: The Court is preventing me from examining him.

THE COURT: I am asking you which way you want to go.

MR. SANDSTROM: I cannot examine in the posture you put it.

THE COURT: I will put Mr. Edson back on the stand.

MR. SANDSTROM: I cannot examine in the posture you have put it.

THE COURT: I find you in contempt of Court and sentence you to thirty days in jail.

Mr. Bailiff, take him to jail.

MR. SANDSTROM: I have the right to appeal.

THE COURT: You have a phone call in the jail to your partner, Mr. Haddad. You are going to jail, Mr. Sandstrom.

MR. SANDSTROM: I have the right to supersedeas immediately as a matter of right.

THE COURT: And this Court will be recessed until you decide to change your mind or until you take the matter before the Appellate Court.

Mr. Nolan will be taken back to his cell. The other prisoners will be taken into the custody of the U.S. Marshal. Mr. Sandstrom will go to jail, and he will remain there until an appeal is filed or a petition is filed by the Appellate Court, and this Court will stay in recess until such time as something happens, the Appellate Court orders me to go back to trial, declare a mistrial, release Mr. Sandstrom, or go on with the trial, whichever.

THE BAILIFF: This trial is in recess until further notice.

The next day a mistrial was declared in the murder trial and the trial judge recused himself from further responsibilities in the matter, by explaining that,

"this Court feels that it can't give the defense—I should say the defendant—a fair trial,"

The record further indicates that on March 14, 1979, the same trial judge denied petitioner, Sandstrom's motion for supersedeas bond. That order read as follows:

"This Court found defendant guilty of criminal contempt of court and refuses the person Ray Sandstrom supersedeas bond notwithstanding he meets the criteria of *Younghams v. State,* he is costing this state anticipated thousands of dollars by interfering with the proceedings of this court and preventing the completion of the trial."

Mr. Sandstrom was apparently later released on his own recognizance by the District Court of Appeal. (*See,* Brief of Appellant submitted to the District Court of Appeal, Fourth District at pg. 4.)

The federal courts have historically sought to maintain a careful balance between the interests of preserving courtroom decorum with the due process rights of defendants charged with contempt. An additional consideration comes into play, when the accused contemnor is a lawyer actively representing a client, *Offut v. United States,* 348 U.S. 11, 99 L.Ed. 11, 75 S.Ct. 11 (1954), for counsel must within limits be protected in the right of an accused to "fearless, vigorous and effective advocacy." Id. at page 15. I should not be misunderstood as suggesting that petitioner's conduct in the subject case was within the ambit of the quote just presented. A decision in that regard will be for another Broward Circuit Judge.

These interests are particularly difficult to balance when the charges in question arise out of confrontation with the judge. One must appreciate that the "power thus entrusted to a judge is wholly unrelated to his personal sensibilities, be they tender or rugged. . . . Judges are also human, and may, in a human way, quite unwittingly identify offense to self with obstruction to law . . . (they must therefore) . . . guard against this easy confusion by not sitting themselves in judgment upon misconduct of counsel where the contempt charged is entangled with the judge's own personal feeling against the lawyer." *Offut v. United States, supra* at 14.

On the other hand, this caveat cannot become an invitation to the guileful who would engage in acts of con-

tempt "in order to drive the judge out of the case for ulterior reasons." *Mayberry v. Pennsylvania*, 400 U.S. at 464.

In these situations,

> "Generalizations are difficult. Instant treatment of contempt where lawyers are involved may greatly prejuice (sic) their clients but may be the only wise course where others are involved. Moreover, we do not say that the more vicious the attack on the judge the less qualified he is to act. A judge cannot be driven out of a case. Where, however, he does not act the instant the contempt is committed but waits until the end of the trial, on balance it is generally wise where the marks of the unseemly conduct have left personal stings to ask a fellow judge to take his place."

Mayberry, supra at 463.

However, the decision to recuse cannot turn solely on when the adjudication of contempt takes place.[1] In a recent Fifth Circuit case, *Spruell v. Jarvis*, 654 F.2d 1090 (5th Cir. 1981), a contempt conviction of a trial attorney was overturned, because the contempt hearing was held after the trial, and therefore another judge should have presided. This ruling does not make the converse true, that when a defendant is cited mid-trial, the presiding judge is automatically the proper judge for the task. Unfortunately, this formalistic symmetry was seemingly embraced by the state appellate court. *See, Sandstrom v. State*, 402 So.2d 461 (1981).

An entire constellation of factors must be taken into account in order to balance the underlying interests. One of the more important considerations is the level of hostility within the trial. Here, the trial judge was not suf-

fering from an evanescent irritation. Rather, the record discloses personal hostility which permeated the trial. In such a situation, even the hardiest judge runs the risk of having his judgment clouded by personal feelings.

As a trial judge, I am, of course, in sympathy with the problems presented to hardworking and dedicated state trial judges. It is with reluctance that I conclude that under the circumstances in question, the extended and repeated exchanges, the tenor of the exchanges and the later sentencing that at the very least, the sentencing should have been conducted by another judge. Indeed, it was evident to the trial judge that a mistrial was necessary (as much of the colloquy was in front of the jury) and he frankly acknowledged his personal unwillingness to retry the case because of his attitude. I hasten to blunt what may appear to be criticism of the trial judge. Which of us can predict how we will respond to situations of the type described. That, of course, is not the point. Where a judge, no matter how able, becomes personally and angrily involved with a lawyer, the ultimate question of criminal contempt should, in a case such as presented here, be for another judge. For these reasons, the writ of habeas corpus will issue. At the hearing on the motion, even the state attorney who tried the case stated that the trial judge was "personally involved." Regarding the petitioner's motion for bond, the judge's comments (not necessary to refer to here) are a matter of record in this cause and are interesting with respect to his feelings about the defendant. It should further be noted that the state attorney was of the opinion that the petitioner wanted a mistrial.

This holding should not be interpreted in any way as approval of the petitioner's conduct, nor does it suggest a

reluctance to approve the invocation of the contempt power. This Court recognizes that the contempt power is at times an important means to insure the courtroom will remain a "hallowed place of quiet dignity as far removed as possible from the emotions of the street." *Mayberry v. Pennsylvania, infra* at 456. Nevertheless, that tradition cannot be peserved at the expense of due process. Accordingly, it is

ORDERED AND ADJUDGED that the petition for writ of habeas corpus is granted. The state shall either afford petitioner Sandstrom a new trial, within 90 days, or release him from custody.[2]

DONE AND ORDERED in Chambers at Miami, Florida, this 19th day of May, 1983.

/s/ William M. Hoeveler
United States District Judge

FOOTNOTES

1. The record indicates that the petitioner was cited for contempt at least once in the course of the trial, and then ultimately again the afternoon before the declaration of the mistrial.

2. That the petitioner has been released on bond does not alter his status as being "in custody" of the State since he is not free from significant restraints on his freedom. *Jones v. Cunningham,* 371 U.S. 236 (1963).